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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 43

STANLEY MARKIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR PETITIONER STANLEY MARKIS

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Opinion of Court of Appeals in *U. S.* v. *Markis*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 514—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket No. 29585

UNITED STATES OF AMERICA,

Appellee,

—v.—

STANLEY JOSEPH MARKIS,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge,* convicting appellant, after a verdict, on a two-count information charging violation of 26 U. S. C. §7203 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

CHARLES HANKEN, Bridgeport, Conn. (Philip Baroff, on brief), *for Appellant.*

HOWARD R. MOSKOF, Assistant United States Attorney (Jon O. Newman, United States Attorney), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Markis appeals from a judgment of the District Court for Connecticut convicting him, after trial before Chief Judge Timbers and a jury, on a two-count information under 26 U. S. C. §7203 of wilful failure to pay the special occupational gambling tax provided in §4411 and to register as required in §4412. He was sentenced to imprisonment for one year and a $10,000 fine on the first count and to two years probation on the second. His arguments as to the unconstitutionality of the statutes are dealt with in *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965). Although he now presses the claim of unfair publicity, he requested trial at Bridgeport, and made no motion for a change of venue or a continuance. No juror selected to try him had read of his arrest, none of the publicity concerning the trials preceding his had referred to him, and he made no motion relating to publicity until after verdict. Apart from all else, this came too late, *United States* v. *Costello*, *supra*.

Special Agent Ripa of the I. R. S. testified that on many occasions in August and September, 1964, he placed bets with John Mento in the latter's service station, observed Mento dial telephone number 336-0254, and heard him speak with a man whom, on almost all occasions, he asked for or addressed as "'Joe," and repeat the wagers. Records of the telephone company showed that number 336-0254 was located in apartment C-6, 2225 Main Street, Bridgeport. It was a number in the name of Mrs. Peggy Donofrio; no one by that name could be identified. Markis had long occupied the apartment, which was listed in the name of F. Scinto, also unknown, and frequently paid the rent. He was observed entering and leaving the apartment in the period

when the bets were being placed. About July 27 he was introduced to Ripa by the nickname "Stash."

On affidavits of agents reciting the substance of the above and further details, including Markis' failure to purchase an occupational tax stamp, a United States Commissioner, on October 1, 1964, issued a warrant commanding a search of the apartment for and seizure of "certain records, papers, writings, slips, books, newspapers primarily reporting results and information of horse races and other sporting activity, markings, writing materials, racing forms, cash monies, machines and equipment" being used in violation of the gambling tax laws. On October 5, 1964, the agent who had made the principal affidavit swore before the same Commissioner to a complaint which alleged "'That on or about October 8, 1964," John Doe, also known as Joe or Stash, engaged in the business of accepting wagers without payment of the Occupational Stamp Tax; the complaint contained the substance of what had been set forth in the search warrant affidavits although in more abbreviated form and without the statement that a search of the records had revealed no purchase of a stamp by Markis. On the same day the Commissioner issued a warrant of arrest.

The search and arrest warrants were executed by Special Agent Ryan, accompanied by other officers, on October 8 about 1:15 P.M. After knocking and making proper announcement, Ryan heard movement inside but the door was not opened. An attempt to force entry with a sledge hammer failed, the door having been barricaded. Shortly thereafter the officers heard the barricade being removed, and the door was opened by Markis, wearing pajama bottoms and one wet slipper; he identified himself, stating his name and acknowledging he was known as "Stash" or "Joe." Ryan gave Markis both warrants to read. He found

a quantity of paraphernalia useful for the conduct of a gambling business, the telephone, bearing number 336-0254, torn out of the wall and with the amplifier separated from the receiver, and, in the bathroom, the mate to the wet slipper. The telephone having been repaired, unknown voices called and sought to place bets with "Stash" or "Joe." Flushing of the toilet trap with the aid of a plumber yielded slips of paper which were identified as notations by gamblers to record bets. While still in the apartment, Ryan interviewed Markis, after explaining "that he had the rights under the Fifth Amendment against self-incrimination, and that he didn't have to answer any questions that I asked him." Ryan testified, without objection:

> "I asked him why he hadn't purchased a wagering stamp, and he said he didn't need one because he doesn't take bets, that he only gambles for a living.
>
> • • • • •
>
> "And I asked him if he was accepting wagers, would he have registered and purchased a Federal wagering stamp, and he said he would have."

(1) Markis claims it was error to admit Ripa's testimony as to Mento's placing of bets by telephone in the absence of identification of Markis' voice as that on the receiving end. It is plain that Ripa could not be allowed to testify as to what Mento said the receiver said; Mento alone could do that. See *Van Riper* v. *United States*, 13 F. 2d 961, 968 (2 Cir.), cert. denied, 273 U. S. 702 (1926); *United States* v. *Benjamin*, 328 F. 2d 854, 861 (2 Cir.), cert. denied, 377 U. S. 953 (1964). But Mento's dialing of 336-0254 and his placing of bets, including language used in doing so, were not declarations introduced for their truth, and the hearsay rule thus has no application to Ripa's testimony re-

lating to these events. See *United States* v. *Press*, 336 F. 2d 1003, 1011-12 (2 Cir.), cert. denied, 379 U. S. 965 (1964); *United States* v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963); McCormick, Evidence §§225, 228 (1954). If Mento's remarks addressing the unseen listener as "Joe" were to be regarded as hearsay on the basis, perhaps over-nice, that they amounted to declarations by Mento that he was talking to someone who acknowledged or whose voice confirmed being "Joe," the statements would come within the hearsay exception for utterances made simultaneously with the event being perceived—an exception normally classified under *res gestae*, McCormick, *supra*, §273; Uniform Rule of Evidence 63(4). It is true that, standing alone, all this testimony, even though not banned by the hearsay rule, would be objectionable as irrelevant. But that deficiency was removed by the evidence that the telephone bearing the number 336-0254 was in the apartment Markis occupied and his admission to Agent Ryan that he was known as "Joe."[1] This factual chain afforded competent circumstantial evidence that Markis was indeed the man with whom Mento was placing bets.

(2) Markis contends that the search warrant was invalidly issued, that the search and seizure went beyond "the means of committing" the offense, F. R. Cr. P. 41(b)(2), and that the arrest warrant was invalid so that all fruits of the arrest must be excluded.[2]

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1 Since Markis did not urge, here or in the district court, that receipt of his admission to Agent Ryan violated the extrapolation of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), which is currently mooted, we need not deal with that question.

2 In view of the amendment of 26 U. S. C. §7608 by 76 Stat. 1143 (1962), the question which concerned us in *United States* v. *Viale*, 312 F. 2d 595, 599-600 (2 Cir.), cert. denied, 373 U. S. 903 (1963), no longer arises.

The search warrant was valid under the criteria stated in the Supreme Court's most recent decision on the subject, *United States* v. *Ventresca*, 380 U. S. 102 (1965). The attack on the arrest warrant based on the point that, in obvious error, the complaint alleged Markis had committed the offense three days in the future requires no discussion. Cf. *United States* v. *Zambito*, 315 F. 2d 266, 269 (4 Cir.), cert. denied, 373 U. S. 924 (1963). We find no other sufficient basis for holding the arrest warrant defective. A complaint, like affidavits supporting a search warrant, must be read "in a commonsense and realistic fashion." *United States* v. *Ventresca, supra*, 380 U. S. at 108. Furthermore, despite the statement in F. R. Cr. P. 4, "If it appears from the complaint that there is probable cause to believe," we are by no means convinced that the Rules meant to prohibit a Commissioner from relying on affidavits, relating to the same person and the same offense, which he had considered in issuing a search warrant only four days before; the fact that the Advisory Committee on the Criminal Rules has recommended an amendment expressly permitting the necessary showing for an arrest warrant to be made by affidavits, 31 F. R. D. 665, 670; 34 F. R. D. 411, 415, by no means establishes that the existing Rule would not be construed to permit this.

The remaining issue under this heading is the scope of the search and seizure. Although the objects seized were within the description of the warrant, that would not be determinative if its reach exceeded the bounds permitted by F. R. Cr. P. 41(b)(2) or the Fourth Amendment. We entertain no doubt that sporting newspapers, slips on which bets were being recorded, pens for recording bets, the calendar for checking races, and the much abused telephone were "instrumentalities and means by which" the crime

here charged—the conduct of a wagering business without payment of the tax or registration—was being committed. *Harris* v. *United States*, 331 U. S. 145, 154 (1947). See *Rutherford* v. *United States*, 264 F. 2d 180 (9 Cir.), cert. denied, 359 U. S. 1003 (1959); *United States* v. *Shaffer*, 291 F. 2d 689 (7 Cir.), cert. denied, 368 U. S. 915 (1961). The issue is thus narrowed to the bills for rent and for telephone service. To support their seizure the Government invokes *Marron* v. *United States*, 275 U. S. 192, 199 (1927), where the Court sanctioned the seizure of utility bills of an enterprise conducted in violation of the National Prohibition Act. Appellant claims the authority of *Marron* to have been undermined by later decisions, as argued in Chief Judge Sobeloff's dissenting opinion in *United States* v. *Boyette*, 299 F. 2d 92, 97-98 (4 Cir.), cert. denied, 369 U. S. 844 (1962). We are not persuaded of this and would follow *Marron* unless the Court should instruct otherwise. But even if we should be wrong in this, we would hold that receipt of these items in evidence would have been harmless error, 28 U. S. C. §2111, F. R. Cr. P. 52(a).[3]

(3) Markis' most impressive argument for reversal is that the judge erred in refusing to give a requested instruction that the jury might convict of a lesser included offense. Consideration of this requires a statement of the pertinent statutes.

Chapter 75 of the Internal Revenue Code creates a hierarchy of sanctions under the revenue laws. Section 7201, "the capstone," *Spies* v. *United States*, 317 U. S. 492, 497

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3 Since both the rent receipts and the telephone bills were made out in names other than that of the defendant, it is difficult to see what they added to the Government's case. The rent receipts were particularly insignificant, since the secretary to the apartment building manager testified that Markis often paid the rent of apartment 6-C to her.

(1943), provides that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" shall be guilty of a felony, subject to a maximum fine of $10,000 and maximum imprisonment of five years. Next in rank stands §7203 under which Markis was prosecuted; this says that "any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . or supply any information" who wilfully fails to comply is guilty of a misdemeanor, again with a maximum fine of $10,000 but with imprisonment limited to a year. Passing over other offenses not here relevant, we come to §7262, which provides that any person who does any act that makes him liable to the special occupational tax on gambling "without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000." Finally, with an exception not here relevant, §7272(a) directs that "any person . . . who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50."

Among Markis' written requests for instructions was the following:

> "If you find that the Defendant was required under the Statute to register and pay the tax but that he did not wilfully, as I described the word wilfully to you, fail to pay such tax or wilfully fail to so register but that he merely did not pay the tax or register, then you may find him guilty of the lesser included offense set forth in 26 U. S. C. 7262.
>
> Rule 31(c) Federal Rules of Criminal Procedure."

Chief Judge Timbers declined to give this as "incomprehensible to the Court," due exception was taken, and although the requested charge may have been too broad, see note 6 *infra*, we regard the point as sufficiently raised.

F. R. Cr. P. 31(c), referred to in the request, provides that a defendant "may" be convicted of any "offense necessarily included in the offense" charged. Despite the fact that the primary purpose of the Act of June 1, 1872, §9, 17 Stat. 198, carried forward by this Rule, was to aid the prosecution when its proof did not fully live up to expectation, it is a long settled principle that, in appropriate cases, it may also be availed of by the defense, *Stevenson* v. *United States*, 162 U. S. 313 (1896)—although the Supreme Court has rarely found cases suitable for its application. See *Berra* v. *United States*, 351 U. S. 131 (1956); *Sansone* v. *United States*, 380 U. S. 343 (1965).

In its latest pronouncement the Court has defined the rule as applicable when "the lesser offense is included within but not, on the facts of the case, . . . completely encompassed by the greater." *Sansone* v. *United States, supra*, 380 U. S. at 350. So far as concerns Markis' failure to pay the tax, the case thus turns in the first instance on whether 26 U. S. C. §7262 is a circle included within §7203 or is congruent therewith.

There is no dispute that both sections require proof (1) that Markis was accepting wagers or receiving them on behalf of someone engaged in the business and (2) that he failed to pay the $50 tax. The question is whether §7262 requires the proof of wilfulness, or of the same kind of wilfulness, that §7203 demands. The answer becomes clear when we look at the gambling tax statute as enacted in 1951 and embodied as chapter 27A of the Internal Revenue

Code of 1939. The penalty provision respecting the occupational tax, §3294, reads as follows:

> "§3294. Penalties.
>
> (a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.
>
> (b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.
>
> (c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter."

The cross-reference in paragraph (c) in effect made applicable the felony and misdemeanor penalties for wilful misconduct now contained in §§7201-03. It is thus patent that wilfulness was not an essential element of the offenses described in paragraph (a), the predecessor of §7262 of the 1954 Code,[4] and the reports with respect to the 1954 legislation indicate that the rearrangement was not intended to work a substantive change.[5] See, accord, *United States* v.

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4 See the classical discussion by Mr. Justice Jackson in *Morissette* v. *United States*, 342 U. S. 246, 250-62 (1952).

5 See 3 U. S. Code, Cong. & Ad. News 4577, 5257 (1954).

Kahriger, 210 F. 2d 565, 571 (3 Cir. 1954); *Burks* v. *United States*, 287 F. 2d 117, 125 (9 Cir. 1961), cert. denied, 369 U. S. 841 (1962); compare *United States* v. *Shaffer*, *supra*, 291 F. 2d at 693. Subsequent to the argument before us, the Solicitor General conceded, in a memorandum filed with the Supreme Court on defendant's petition for certiorari to review *United States* v. *Altiere*, 343 F. 2d 115 (7 Cir. 1965), that §7262 does not require proof of wilfulness, and the Government has withdrawn its contrary contention here.[6]

It argues, however, that even on this basis refusal of the instruction was not error since, as said in *Sansone*, "A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a *disputed* factual element which is not required for conviction of the lesser-included offense," 380 U. S. at 350 (emphasis supplied), and, as it urges, Markis' wilfulness was not really in dispute. The Government does not, of course, deny that the issue of wilfulness was disputed in the sense that it had to be submitted to the jury since, absent a concession, there can never be a directed verdict for the prosecution on any issue in a criminal case. Its argument is rather that, as *Sansone* itself demonstrates, something more than that is required to create "a disputed factual element" in the sense of that opinion, and that, in view of Agent Ryan's unimpeached testimony as to Markis' admission shortly after arrest,[7] that extra something did not exist here.

If the testimony had come from Markis' lips, we would be quite sure the Government was right. For then Markis

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6 The Solicitor General's concession went only to §7262 and reserved the question whether §7272 states an offense or merely a civil penalty. Our opinion is similarly limited.

7 For reasons indicated in note 1, the admissibility of Markis' admission need not be considered.

would have admitted knowing that conducting a wagering business or receiving wagers required payment of a tax, the jury must have found he was doing exactly that, and there was nothing to suggest that the activity proved against him was so close to the line that he might reasonably have thought the law inapplicable to it. We reach the same result although the testimony was of an extrajudicial statement allegedly made by Markis when, as here, the making of the statement was not attacked or contradicted. The mere fact that the jury was still free to disbelieve this portion of the agent's testimony does not elevate the issue to a truly "disputed" one; in the language of the Model Penal Code §1.07(5) (1962), it does not provide "a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Model Penal Code §1.08 comment, at 42-43 (Tent. Draft, No. 5, 1956). This hits the essential point. The lesser-included offense charge is not required simply because the jury could exercise its power of acquitting on the greater charge for no reason at all "in the teeth of both law and facts," *Horning* v. *District of Columbia*, 254 U. S. 135, 138 (1920); there must be a rational basis for its doing so. Precisely this, we think is the distinction between *Sparf* v. *United States*, 156 U. S. 51, 63-64 (1895), and *Stevenson* v. *United States*, *supra*, 162 U. S. at 315, 322-23, both cited by the Court with apparent approval in the recent cases of *Berra* and *Sansone*.

Appellant's other points do not require discussion.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Costello, Marchetti and Gjanci*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8,.1965 Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA,

Appellee;

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES "TOTTO" MARCHETTI,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR GJANCI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

PHILIP R. SHIFF, New Haven, Conn. (Adrian W. Maher, on brief), *for Appellant Frank Costello.*

JACOB D. ZELDES, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), *for Appellant Marchetti.*

CARROLL W. BREWSTER (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn.) Kimberly B. Cheney, on brief), *for Appellant Gjanci.*

JON O. NEWMAN, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

These three appeals, along with *United States* v. *Piccioli*, —— F. 2d ——, and *United States* v. *Markis*, —— F. 2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26 U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the

Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime

against the states, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

With respect to the first contention, apart from questions as to what effect on constitutionality statements by prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only

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1 Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both *Kahriger* and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F. 2d

577, 580-81 (7 Cir. 1964), cert. denied, —— U. S. —— (1965); *United States* v. *Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U. S. 259, 263-64 (1927); *United States* v. *Kahriger, supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and

that Costello, Marchetti and a third man had bail fixed at $10,000, $5,000 and $5,000, respectively, while the figure for the other defendants was $2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall* v. *United States*, 360 U. S. 310 (1959); *United States ex rel. Brown* v. *Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck* v. *Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest of judgment after

the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States* v. *Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States* v. *Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that

other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins* v. *United States*, 282 F. 2d 53, 57 (10 Cir. 1960); *United States* v. *Annunziato*, 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953), there is a distinction

between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*, §1079, and the agency does not go beyond statements in furtherance of the conspiracy.[2] Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.[3] Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to

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2 Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), aff'd, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, Evidence §245, at 522 n. 33 (1954).

3 Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak*, acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See *United States* v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).[4]

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.[5] Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and

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4 The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States* v. *Puglisee*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato*, *supra*, 293 F. 2d at 378; *United States* v. *Smith*, 343 F. 2d 847 (6 Cir. 1965).

5 We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States* v. *Dennis*, *supra*, 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7, the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States* v. *Morello*, 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the *act* of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context below. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States* v. *Kahaner*, 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if

he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957). The Government contends, *inter alia*, that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to protect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States* v. *Ladson*, 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States* v. *Indiviglio*, —— F. 2d —— (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Piccioli*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket No. 29521

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARL A. PICCIOLI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellant, after a verdict, on a two-count indictment charging violation of 26 U. S. C. §7302 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

PHILIP BAROFF, Bridgeport, Conn. (Charles Hanken on brief), *for Appellant.*

HOWARD T. OWENS, JR., Assistant United States Attorney (Jon O. Newman, United States Attorney, District of Connecticut), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Piccioli was charged in a two-count indictment with violating 26 U. S. C. §7302 by wilful failure to pay the special gambling tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412, and was convicted on both counts before Chief Judge Timbers and a jury. He was sentenced on the first count to imprisonment for one year and a fine of $5,000; on the second, imposition of sentence was suspended and probation fixed at two years.

Piccioli was one of the proprietors of the Pin-Up Bar in Bridgeport. Special Agent Ripa of the I. R. S., testified (on cross-examination) that "Artie" Gjanci, a defendant in *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), instructed that, through arrangement between himself and Piccioli, Ripa could place bets with Piccioli and that, when doing this by phone, he should say "This is Bill for Artie." Thereafter Ripa placed numerous horse race bets with Piccioli. There was evidence of furtiveness on Piccioli's part in accepting Ripa's wagers and paying his winnings. During the October 8 raid described in the *Costello* opinion, Special Agent Macolini obtained nearly $500 in cash and checks from Piccioli's pockets, along with three issues of a horse racing publication used by bookmakers. On that occasion in one hour a Connecticut State Trooper engaged in the search of the Pin-Up Bar received 23 calls from persons who were seeking to ascertain odds or, as the jury could properly infer, were about to place bets. Since this and other evidence warranted conviction, we turn to Piccioli's claims of error:

(1) Our *Costello* opinion details the publicity on October 8 and 9. When Piccioli was put to plea in New Haven on October 21, he requested that trial be had in Bridgeport, where the publicity had been most intense. On November

30 and December 1 four juries to try Piccioli's and other gambling cases were selected from the same venire, apparently with the understanding that the cases would be tried *seriatim;* the record shows no objection to that procedure and, when Piccioli's jury was being selected, the only venireman who recalled reading or hearing of his case was not chosen. His trial was adjourned until after that of Costello, Marchetti and Gjanci, which was widely publicized in the Bridgeport press. Piccioli's name figured in this, he being the "Carl" referred to in our opinion in that case; the papers reported he had been subpoenaed by the Government and had been excused at his lawyer's request. When Piccioli's case was called for trial on December 15, his counsel sought a new jury or a continuance because of the publicity given the Costello trial and Piccioli's involvement in it. The judge denied this but said he would inquire of the jurors, which he did without objection from counsel. When asked whether they had read or heard anything about the case or about Piccioli, there was no response.

In this aspect Piccioli's case is not significantly different from that of Costello, Marchetti and Gjanci. No objection on the score of the publicity on October 8 and 9 was made before the adverse verdict. The only issue relating to publicity which was brought to the judge's attention prior to trial was the newspaper accounts of the trial of Costello, Marchetti and Gjanci. A correct report of the trial and conviction of other persons for the same type of offense would not in and of itself be prejudicial, even when, as here, one of them figured in the evidence at the later trial; and there is no reason to suppose the jurors would read into the request that Piccioli be excused a claim of the privilege against self-incrimination. Moreover, we see no reason why the judge had to disbelieve the jurors' responses that the reports had not come to their attention.

(2) Another point has more merit but, in our view, not enough to demand reversal. Special Agent Macolini testified that after completing his search at the Pin-Up Bar, he told Piccioli and the latter's attorney, Mr. Hanken, who had entered the kitchen area in pursuit of a cup of coffee shortly after the raid, that he would like to ask "a few personal history questions"; that the attorney said he had instructed Piccioli not to answer questions; that Macolini then submitted his question sheet to Mr. Hanken; and that the attorney allowed Piccioli "to answer those personal history questions that were on the sheet." No objection was made to this, and the subject was not revived by counsel in cross, redirect, or recross examination. At the conclusion of Macolini's testimony, the judge reverted to this episode and, over objection by defense counsel, elicited an affirmative answer from Macolini to a question, "But the defendant was instructed in your presence by Mr. Hanken not to answer any questions with respect to whether or not he was accepting horse wagers on the premises." After listening to argument, the judge said, "I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened," and then instructed "that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law . . . What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer." In submitting the case to the jury, the judge recounted Macolini's testimony and added that Mr. Hanken had a right to advise Piccioli not to answer questions and that Piccioli had a constitutional right not to do so.

Inquiry designed to establish that a defendant claimed the privilege against self-incrimination before a grand jury

or a legislative committee or failed to testify at a former trial has been held in several cases to constitute reversible error. See *Grunewald* v. *United States*, 353 U. S. 391, 415-24 (1957); *Stewart* v. *United States*, 366 U. S. 1 (1961); *United States* v. *Gross*, 276 F. 2d 816 (2 Cir. 1960). If the privilege attaches at the moment of arrest, as the judge assumed, inquiry to show its assertion at that time would seem equally banned.[1] And we would reach the same conclusion although that assumption is wrong and the right of an arrested person not to respond rests simply on the lack of any power in the police to compel testimony—a hotly controverted issue[2] which we need not here decide. Silence under such circumstances, at least when, as in this case, it results from the advice of an attorney, affords no fair ground for relevant inference, see *Kelly* v. *United States*, 236 F. 2d 746, 749 (D. C. Cir. 1956); yet a jury would be likely to give it not inconsiderable weight. As said by Mr. Justice Harlan in *Grunewald, supra*, 353 U. S. at 424, with respect to a claim of privilege before a grand jury, "the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used." Cf. *McCarthy* v. *United States*, 25 F. 2d 298 (6 Cir. 1928); *United States* v. *Pearson*, 344 F. 2d 430 (6 Cir. 1965).

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1 Presumably this is what is meant by the statement in *Fagundes* v. *United States*, 340 F. 2d 673, 677 (1 Cir. 1965), characterizing the right to remain silent on arrest as "akin to the right to decline to take the witness stand in one's own defense." See also *Helton* v. *United States*, 221 F. 2d 338, 340-42 (5 Cir. 1955); but see *Kelly* v. *United States*, 236 F. 2d 746, 750-51 n. 10 (D. C. Cir. 1956).

2 See 3 Wigmore, Evidence §2250, at 328-29 & n. 27 (McNaughton rev. 1940); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-30 (1949); Note, The Privilege Against Self-Incrimination: Does It Exist in the Police Station?, 5 Stan. L. Rev. 457 (1953); 1 Morgan, Basic Problems of Evidence 146-48 (1961); Maguire, Evidence of Guilt §2.03, at 15-16 (1959).

The judge's question, for which the cold record affords no apparent reason, was thus ill-advised, to say the least. Nor was it cured, as the Government urges, by his subsequent instruction that the lawyer and Piccioli had been acting within their rights; the proper caution would have been that the evidence was to be disregarded and no inference drawn therefrom. But we cannot see that the question and answer added anything so significant to what Macolini had testified on his direct examination without objection as to afford sufficient basis for reversal, 28 U. S. C. §2111, F. R. Cr. P. 52(a).

(3) The final point requiring discussion is the contention that the judge took impermissible considerations into account in passing sentence.

Piccioli was sentenced on January 11, 1965, along with defendants in other gambling tax cases. In explaining the sentences in the *Costello, Marchetti* and *Gianci* cases, Chief Judge Timbers made certain remarks which we set forth in part in the margin.[3] He followed these by recommending

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3 "The Court regards these charges as serious. It is faced with the duty of imposing sentence following a finding of guilty by a jury.

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

"As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is

that the United States Attorney forward a transcript of them and of the evidence to Connecticut prosecutors. Later, on February 8, before taking up the criminal calendar in New Haven, Chief Judge Timbers made a further statement about the gambling tax cases with which he had been concerned. In this statement, some nine printed pages long, he praised the work of the United States Attorney and his staff, of the Intelligence Division of the Internal Revenue Service, and of the Connecticut State Police; deprecated the absence of cooperation by the local Bridgeport police and "the apparent lack of willingness or ability on the part of certain of the prosecutors (in one instance under the pretense of 'public apathy,' which is pure, unadulterated bunk) and judges of the state circuit court to back up the local and state police in enforcing the gambling laws of this state"; and noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime." After announcing his intention to impose stiff sentences for violation of the federal gambling tax and related laws, he ended by proposing that a Connecticut Conference on Law Enforcement be convened, and outlined a detailed program for its membership and activities.

The circumstances under which an appellate court will interfere with a sentence within the permissible maximum because of the judge's reliance on allegedly irrelevant cri-

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well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. The Court intends, by the sentences here to be imposed, to serve a stern warning, once again, as the Court has repeatedly in the past, that the United States is not powerless to deal effectively with violations of the Federal revenue laws and particularly the law here involved. It will do so, if need be, alone."

teria, see *United States* v. *Wiley*, 267 F. 2d 453 (7 Cir. 1959), are and, so long as such sentences are generally unreviewable, ought be rare. It would be wholly appropriate for the judge to look beyond Piccioli's failure to register and buy a $50 tax stamp and to consider the attendant substantial losses of revenue through his failure to pay the percentage tax on wagers, of which the judge had heard abundant evidence, even though that crime had not been charged. Cf. *United States* v. *Doyle*, —— F. 2d ——, —— (2 Cir. 1965). Piccioli's argument is thus reduced to the claim that the judge was enforcing not simply the federal laws which were his proper concern but state laws which were not. The record does suggest that the judge's indignation at what he had learned at the trials and from presentence reports may have led to statements in the prosecutorial area beyond his function. On the other hand, since he could have taken into account a record of state crimes and charges unrelated to the federal offense proved, it would be strange if he could not consider that the evidence showed a violation of state gambling laws and the effect of gambling on other state crime. Cf. *United States* v. *Doyle, supra.*

Piccioli's other points either are dealt with in *United States* v. *Costello* or lack sufficient merit for discussion.

Affirmed.

Opinion of Court of Appeals in *U. S.* v. *Grassia*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello*, —— F. 2d —— (2 Cir. 1965), *United States* v. *Piccioli*, —— F. 2d —— (2 Cir. 1965), and *United States* v. *Markis*, —— F. 2d —— (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello, supra*, —— F. 2d at ——, slip opinion at 3325-26; *United States* v. *Piccioli, supra*, —— F. 2d ——, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere*, as the Government concedes. But, so far as this Court is concerned, they have been deter-

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1 The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

mined adversely to Grassia by *United States* v. *Costello, supra,* —— F. 2d ——, slip opinion, 3322-25. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v. *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor and the court that Grassia intended to press the point on appeal, contrast *United States* v. *Doyle,* 348 F. 2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering in-

consequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States* v. *Costello, supra*, —— F. 2d at ——, slip opinion, 3326, it proved possible to obtain impartial juries even at Bridgeport where the publicity was at its peak, see *United States* v. *Piccioli, supra*, —— F. 2d at ——, slip opinion, 3336-37; *United States* v. *Markis, supra*, —— F. 2d at ——, slip opinion, 3344. Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.[2] And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even

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[2] As indicated in *United States* v. *Costello, supra*, —— F. 2d at ——, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

more ill-advised than we indicated in *United States* v. *Piccioli, supra,* —— F. 2d at ——, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

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Excerpts From Testimony

RICHARD J. RYAN—for Government—direct.

* * * * *

A. * * * I asked him why he hadn't purchased a wagering stamp, and he said he didn't need one because he doesn't take bets, that he only gambles for a living.

* * * * *

And I asked him if he was accepting wagers, would he have registered and purchased a Federal wagering stamp, and he said he would have.

* * * * *

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The Court: * * *

* * * * *

But acting consistently with the way I have attempted to from the outset, I will reserve decision on the defendant's motion to strike, and grant leave to the Government forthwith to connect, if it is able to do so, the defendant with these conversations or the placing of these wagers to which Mr. Ripa has testified—absent which connection I of course will strike the testimony.

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